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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

ALEXANDER BOYD,

Petitioner

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

BRIEF OF GRAND TRUNK WESTERN RAILROAD COMPANY IN OPPOSITION

H. VICTOR SPIER
Attorney for Respondent
Business Address:
441 E. Jefferson Avenue,
Detroit, Michigan

GEORGE F. GRONEWOLD
Of Counsel
Business Address:
1514 Security National Bank Building,
Battle Creek, Michigan

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 486

ALEXANDER BOYD,

Petitioner

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

BRIEF OF GRAND TRUNK WESTERN RAILROAD COMPANY IN OPPOSITION

I

OPINION BELOW

Grand Trunk Western R. Co. v. Boyd, 321 Mich. 693, 33 N.W. (2d) 120. (R. 52)

II

JURISDICTION

Respondent agrees that the Court has jurisdiction.

III

QUESTIONS PRESENTED

Following the opinion of the Court below and the denial by that Court of Petitioner's application for a rehearing, Petitioner voluntarily filed suit against Respondent in the District Court of the United States for the Eastern District of Michigan, Southern Division, to recover damages for the same alleged cause of action for which the original case was filed in the Superior Court of Cook County, Illinois, the prosecution of which was enjoined by the Supreme Court of Michigan (R. 9, 97). The Complaints in the two cases are identical (see appendix to Petitioner's Brief, p. —, and the appendix to this Brief). The Michigan case is now at issue and is awaiting trial. The action of Petitioner in commencing it is in compliance with his contracts (R. 25-26, 26-27) and the injunction issued out of the Supreme Court of Michigan (R. 9, 97) and is tantamount to abandonment of his case in Illinois, and renders the whole controversy moot.

Respondent submits that the following two questions are dispositive of the instant application for certiorari:

1. Whether the voluntary filing of suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, renders the case moot.

2. Whether there is a federal question of substance involved, not heretofore decided by this Court or decided in a way probably not in accord with applicable decisions of this Court.

IV

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the case with the exception that the following should be added:

In the Order of the Supreme Court of Michigan, dated October 21, 1948, staying all proceedings pending determination by this Court of Petitioner's application for Writ of Certiorari, it was provided that the injunction theretofore issued by it on December 2, 1947 (R. 9) "shall remain in full force and effect" (97). Six days thereafter, on October 27, 1948, Petitioner, in compliance with his contracts (R. 25-26, 26-27) and the Orders of the Supreme Court of Michigan (R. 9, 97), filed suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, for damage for the identically same alleged cause of action that was involved in the proceedings before the Supreme Court of Michigan (Appendix hereto).

The accident complained of happened on November 23, 1946 (R. 18) and the Statute of Limitation (45 U.S.C.A.

56, Sec. 6, 36 Stat. 291) will not bar commencement of an action in any permitted jurisdiction for nearly a year yet, and the filing of the suit in Michigan was wholly voluntary and without compulsion or necessity of any kind other than the fulfillment of Petitioner's contractural obligations.

V

ARGUMENT

1. **The case is moot.** The filing of the suit in the District Court of the United States for the Eastern District of Michigan, Southern Division, was in accordance with applicant's contractural obligations (R. 25-27), and the Orders of the Supreme Court of Michigan (R. 9, 97), and is tantamount to an abandonment by Petitioner of his suit in Illinois. The Federal Court case in Michigan can proceed to trial and final determination of every issue in it (which includes every issue in the Illinois case) regardless of whether a Writ of Certiorari is issued in this proceeding or of the ultimate determination of the issue presented by Petitioner if the Writ is issued.

It is respectfully submitted that this renders the case moot.

C. M. Patton & Co. v. United States, 289 U.S. 705, 53 S. Ct. 687;

Hargis v. Bradford, 283 U.S. 781, 51 S. Ct. 342.

This Court will not issue a Writ of Certiorari or otherwise proceed to an adjudication where there is no subject matter on which the judgment of the Court can operate.

Montgomery Ward & Co. v. *U.S.*, 326 U.S. 690;
Ex Parte Bacz, 177 U.S. 378, 390;
Brownlow v. *Schwartz*, 261 U.S. 216, 217;
Chandler v. *Wise*, 307 U.S. 474, 477-478;
Director of Prisons v. *Court of First Instance of the Province of Cavite*, 239 U.S. 633;
Jones v. *Montague*, 194 U.S. 147;
Mills v. *Green*, 159 U.S. 651, 653.

This is so notwithstanding the contention that a determination of the issue is necessary because of contemplated future cases.

Commercial Cable Co. v. *Burleson*, 250 U.S. 360.

The Court is without power to decide moot questions or give advisory opinions.

St. Pierre v. *United States*, 319 U.S. 41.

And the Court should not pronounce judgment on abstract questions even if its opinions might influence future actions under like circumstances.

Richardson v. *McChesney*, 218 U.S. 487, 492.

A similar principal was involved in the recent case of *Brotherhood of Locomotive Engineers, et. al.*, v. *United*

States, 69 S. Ct. 137, and this Court denied Certiorari upon Respondent's objection that settlement between the parties of the question at issue rendered the case moot.

It is no answer for Petitioner to say that he may commence as many actions as he may wish in different permitted jurisdictions. The least that can be said is that the filing of the case in Michigan demonstrates that Petitioner is willing to have his case tried in Michigan if it is reached for trial first and that being true the suggestion leads to the inevitable conclusion that there is no substance to it. This Court ought not to permit itself to be used as a cat's paw in that kind of a game.

2. There is no federal question of substance involved, not heretofore decided by this Court or decided in a way probably not in accord with applicable decisions of this Court.

In the recent case of *Holmes* v. *United States*, 69 S. Ct. 70, this Court had under consideration the provisions of Section 2 of the Suits in Admiralty Act, 46 U.S.C.A. 3741 et seq. 41 Stat. 525, which provides that "* * * such suits *shall* be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." (emphasis ours). The suit was brought in a district other than where the petitioner resided or where the vessel was at the time suit was filed, and the United States answered to the merits, leaving all questions of jurisdiction to the court. This Court held

that, notwithstanding the apparent mandatory provision of the statute designating the districts in which such a suit "shall" be filed, it related only to venue which could be, and was waived. The decision of this Court was unanimous, and we quote from the opinion as follows:

> "The ruling of the District Court that the provisions of Section 2 of the Suits in Admiralty Act, directing where suits shall be brought, were jurisdictional was in our view erroneous. Those provisions properly construed relate to venue.
>
> The section relates not to libels in rem but to libels in personam. A similar provision in §5 of Tucker Act, 24 Stat. 506, 28 U.S.C. (1946 Ed.) §762, 28 U.S.C. §1402, 28 U.S.C.A. §1402, was held to prescribe venue and hence could be and was waived by failure to object before pleading to the merits. United States v. Hvoslef, 237 U.S. 1, 11, 12, 35 S. Ct. 459, 462, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 24, 35, S. Ct. 496, 497, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. An analogous provision in the Jones Act, 41 Stat. 1007, 46 U.S.C. §688, 46 U.S.C.A. §688, was construed the same way. Panama R. Co. v. Johnson, 264 U.S. 375, 384, 385, 44 S. Ct. 391, 392, 393, 68 L. Ed. 748. And we recently indicated that that was the correct construction of comparable provisions of §2 of the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. §782, 46 U.S.C.A. §782 (Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224, 65 S. Ct. 639, 644, 89 L. Ed. 901), an act which is similar in purpose and design to the present one. See American Stevedores v. Porello, 330 U.S. 446, 452, 453, 67 S. Ct. 847, 850, 851, 91 L. Ed. 1011.

> Congress, by describing the district where the suit was to be brought, was not investing the federal courts 'with a general jurisdiction expressed in terms applicable alike to all of them'. See Panama R. Co. v. Johnson, supra, 264 U.S. page 384, 44 S. Ct. 393, 68 L. Ed. 748. It was dealing with the convenience of the parties in suing or being sued at the designated places. The purpose of the Act was to grant seamen relief against the United States in its own courts. The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and unlike private parties is not centered at one particular place. The residence or principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it."

The language of the venue section of the Federal Employers' Liability Act (45 U.S.C.A. §56, Sec. 6, 36 Stat. 291) is not mandatory in its wording,—it says that such suits "*may* be brought", etc. (emphasis ours)—whereas the wording of Section 2 of the Suits in Admiralty Act involved in the *Hoiness* case was that "such suits *shall* be brought", etc. (emphasis ours). Certainly, the issue was much stronger in the *Hoiness* case than in the instant case.

We, therefore, respectfully submit that whatever federal question there may be in the instant application, it is *not* one of substance and that it has already been decided by this Court contrary to the contention of Petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for writ of Certiorari should be denied.

Respectfully submitted,

H. Victor Spike
Attorney for Respondent

Business Address:
441 E. Jefferson Avenue,
Detroit 26, Michigan

George F. Gronewold
Of Counsel

Business Address:
1514 Security National Bank Building,
Battle Creek, Michigan

APPENDIX

DOCKET

DOCKET 7718

TITLE OF CASE

Alexander Boyd,
Plaintiff

v.

Grand Trunk Western Railroad Company,
a corporation,
Defendant

Trespass
Jury trial claimed by Pltf 10/27/48

ATTORNEYS

Emerson H. Shink,
2361 Guardian Bldg.
Detroit 26, Mich.
For Plaintiff:

(Of Counsel)
Edward B. Henslee and
Walter N. Murray,
139 N. Clark St., Suite 810,
Chicago 2, Ill.

For Defendant:
H. V. Spike
William W. Macpherson,
441 E. Jefferson,
Detroit 26, Mich.

Date			Plaintiff's Account	Received	Disbursed	Date			Defendant's Account	Received	Disbursement
Month	Day	Year				Month	Day	Year			
Oct.	27	1948	Filing fees— E. H. Schink	$15.00							

10

UNITED STATES DISTRICT COURT

Date Month	Day	Year	Filings—Proceedings	No. of Words	Clerk's Fees Plaintiff's	 Defendant	Amount Reported in Emolument Report
Oct.	27	1948	Complaint and demand for jury trial filed		15.00		
Oct.	27	1948	Summons issued				
Nov.	2	1948	Summons returned and filed				
Nov.	19	1948	Answer filed				
Nov.	29	1948	Reply filed				
Dec.	14	1948	Proof of service filed				

11

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718
Trial by Jury
Is Demanded

COMPLAINT

EMERSON H. SCHINK
Attorney for Plaintiff

2361 Guardian Building
Detroit 26, Michigan
CAdillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY
Attorneys-at-Law

139 North Clark Street
Suite 810
Chicago 2, Illinois
Of Counsel

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD, *Plaintiff*	Civil Action
vs.	No. 7718
GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation, *Defendant.*	Trial by Jury Is Demanded

COMPLAINT

The Plaintiff, Alexander Boyd, for his complaint in the above entitled action, alleges and shows to this Honorable Court:

1. Plaintiff's action herein arises under the Federal Employers' Liability Act and exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Michigan and under its charter is empowered to and does operate a system of railroad running through the States of Michigan and Illinois, as a common carrier by railroad of passengers and freight for hire, with one of its lines running into Detroit, Wayne County, Michigan, where it maintains an office in charge of officers and agents upon whom service of process may be had.

3. At the time of the accident and injury hereinafter complained of the plaintiff was a yard brakeman em-

ployed by the defendant in its Nichols Yard at or near Battle Creek, Michigan, and in his line of duty engaged in the switching of cars with interstate shipments therein, and by reason thereof plaintiff and defendant were engaged in interstate commerce and transportation and plaintiff's action herein arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, commonly known as the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-59, and the Federal Safety Appliance and Equipment Act, 45 U.S.C.A., Sections 1-16, being an Act of Congress of March 2, 1893, Chapter 196, 27 Stat. 531, with amendments thereto to the present time.

4. At the time of, before and after the acts of negligence hereinafter set forth, the plaintiff was in the exercise of all due care and caution for his own safety.

5. On or about November 23, 1946, at approximately 7:30 P.M. the plaintiff was a yard brakeman and a member of a crew engaged in the making up and breaking up of trains and the switching of cars for the defendant at its Nichols Yard at or near Battle Creek, Michigan, and it became and was his duty in the interest of and in the furtherance of the defendant's business to disconnect one car from a cut of about thirteen cars, and it then and there became and was the duty of the defendant to maintain its cars and equipment thereon and also to operate, control and manage its locomotive and cars so as not to injure the plaintiff rightfully along its lines of railroad.

6. The defendant disregarded its duty toward the plaintiff at the time and place set forth, in one or more of the following ways:

a) Defendant was careless and negligent in that it hauled or used along its lines a car which would not uncouple automatically, contrary to and in violation of the laws of the United States as set forth in 45 U.S.C.A., Chapter 1, Section 2 thereof.

b) Defendant was careless and negligent in the control, management and operation of its locomotive and cars.

c) Defendant was careless and negligent in not giving the plaintiff time to get onto the stirrup on one of its cars in order to disconnect another, contrary to and in violation of the usual method of doing this work.

d) Defendant was careless and negligent in not using ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work in that it allowed one of its ties to protrude above the ballast a distance of four to five inches at a much used and well traveled place on its premises.

e) Defendant was careless and negligent in not using ordinary care to reasonably light its premises so that its men in their line of duty could see the hazardous condition of the premises and protect themselves against stumbling over protruding ties at a much used and well traveled place along its lines of railroad.

7. As a direct and proximate result of one or more of the foregoing acts of negligence the plaintiff had to hurry to catch some cars which were being kicked and did not have time to get onto the stirrup of the car and when he tried the cutting lever to disconnect the car, he found it to be disconnected and the unexpected giving of the cut-

ting lever caused him to strike a protruding tie and threw him with great force and violence to and upon the ground and divers objects thereon, and by reason thereof he was caused to be so injured that divers bones of his body and back were dislocated, broken and compressed; divers membranes, muscles, ligaments, nerves and blood vessels of his body were sprained, torn, cut, bruised and injured; divers other organs of his body were displaced, bruised, torn, injured and their functions impaired; his brain and nervous system were greatly shocked, injured and their functions impaired; he became sick, sore, lame and disabled from thence hitherto; he suffered great pain and anguish by reason of his said injuries, and will in the future continue to suffer therefrom; and by reason of his said injuries he expended and incurred great liability and indebtedness endeavoring to be cured of his injuries, and will in the future expend and incur considerable sums of money endeavoring to be cured of his injuries, and the plaintiff has and will be unable to attend to his customary affairs and business, and he has and will be disabled for an indefinite time in the future, the exact time being unknown to the plaintiff at the present time.

WHEREFORE, the plaintiff claims judgment against the Defendant in the sum of One Hundred Thousand ($100,000.00) Dollars and costs of this action.

EMERSON H. SCHINK,
Attorney for Plaintiff,
2361 Guardian Building,
Detroit 26, Michigan.
Cadillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY,
Attorneys-at-Law,

139 N. Clark St.,
Suite 810
Chicago 2, Ill.
Of Counsel

Dated: October 27, 1948.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718

DEMAND FOR JURY TRIAL

Now comes Alexander Boyd, Plaintiff, by his attorney, Emerson H. Schink, and hereby demands a trial by jury in the above entitled cause and number.

EMERSON H. SCHINK,
Attorney for Plaintiff,
2361 Guardian Building,
Detroit 26, Michigan.
Cadillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY,
Attorneys-at-Law,
139 N. Clark St.,
Suite 810
Chicago 2, Ill.
Of Counsel

Dated: October 27, 1948.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718

ANSWER TO COMPLAINT

Now comes the above named defendant by H. V. Spike, its attorney, and answers plaintiff's complaint as follows:

1. It admits paragraph 1 of plaintiff's complaint.

2. It admits paragraph 2 of plaintiff's complaint.

3. It denies that a right of action exists. It admits the balance of paragraph 3 of plaintiff's complaint.

4. It denies paragraph 4 of plaintiff's complaint.

5. It denies paragraph 5 of plaintiff's complaint.

6. It denies paragraph 6 of plaintiff's complaint.

7. It denies paragraph 7 of plaintiff's complaint.

Further answering, defendant says that if a cause of action ever existed against it as in plaintiff's complaint alleged, the plaintiff thereafter on the seventh day of January, 1947, and for a good and valuable consideration, did release and discharge it of and from all claims, de-

mands, actions, causes of action, losses, costs, damages and expenses of whatsoever nature, kind or description, whether arising under any State or Federal statute or at common law, which may then have existed or might thereafter arise from, out of, or in any manner connected with or attributable to injuries received while employed as a switchman at or near Battle Creek, State of Michigan, on about the 23rd day of November, 1946, as well as from all claims or demands of any kind whatsoever. A copy of said release is hereto attached, marked "Exhibit A" and made a part hereof.

WHEREFORE this defendant having fully answered, asks to be discharged with its costs most wrongfully sustained.

H. V. SPIKE,
Attorney for Defendant,
441 E. Jefferson Avenue,
Detroit 26, Michigan.

Dated: November 18, 1948.

EXHIBIT "A"

GRAND TRUNK WESTERN RAILROAD COMPANY

P.I.R. No. 56007

Name—Alexander Boyd

Route 1—East LeRoy, Michigan.

Classification—Employee

For the sole consideration of Three Hundred and Seventy One ($371.00) Dollars paid to me by Grand Trunk Western Railroad Company, the receipt whereof I do hereby acknowledge, and without any other promise or agreement, written or oral, I do hereby release and discharge Grand Trunk Western Railroad Company, whether chargeable with negligence in the premises or otherwise, of and from all claims, demands, actions, causes of action, losses, costs, damages and expenses of whatsoever nature, kind or description, whether arising under any State or Federal statute or at common law, which may now exist or may hereafter arise from, out of, or in any manner connected with or attributable to injuries received while employed as switchman at or near Battle Creek, State of Michigan, on or about ~~the 23rd~~ day of November, 1946, as well as from all claims or demands of any kind whatsoever.

I have read and understand the above release.

Received $371.00 in full settlement Jan. 7, 1947.

Alexander Boyd (Signed)

(Seal)

RELEASE

Voucher—Paid by Draft—No. 3773

This release was read by and signed by the said Alexander Boyd in our presence at Battle Creek, Mich. on the 7th day of Jan. 1947.

Melba Clewien, 373 Main St., Battle Creek, Mich.

T. O. Leveille, 116 Fremont St., Battle Creek, Mich.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant.

Civil Action
No. 7718

PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER

EMERSON H. SCHINK
Attorney for Plaintiff

2361 Guardian Building
Detroit 26, Michigan
CAdillac 2270

EDWARD B. HENSLEE and
WALTER N. MURRAY
Attorneys-at-Law
139 North Clark Street
Chicago 2, Illinois
Of Counsel

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXANDER BOYD,
Plaintiff

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant

Civil Action
No. 7718

PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER

1. Plaintiff admits that he signed document designated release attached to defendant's Answer as Exhibit A on the date it bears but states the fact to be that he was induced to sign said document and to accept the consideration therein mentioned by the representations of defendant's Claim Agent and defendant's physician that plaintiff's back was merely sprained and that he could go to work at that time.

2. These representations of defendant's Claim Agent and doctor were false and fraudulent and made for the purpose of inducing plaintiff to accept the small sum of Three Hundred and Seventy One Dollars ($371.00) in settlement of his claim and if not made falsely and fraudulently, were made by mistake of the doctor in not correctly interpreting the X-rays which showed fractures in the vertebrae of plaintiff's back. The plaintiff signed said

release and accepted the amount heretofore set forth in reliance upon said false and fraudulent representations of the doctor and Claim Agent, relying upon the correctness of the doctor's interpretation of his injuries without knowledge of the serious nature of his injuries.

3. If from the evidence it is determined that there was no fraud in the execution of the release but that it was executed through mutual mistake of the parties as to the seriousness of the plaintiff's injuries, in that event the plaintiff wishes to do equity and asks leave of Court to tender the amount involved in the release.

WHEREFORE plaintiff prays that said release be held to be null and void for fraud in its execution or by reason of the mutual mistake of the parties and asks that the plaintiff may have such other and further relief as the Court shall deem just and fair.

EMERSON H. SCHUCK,
Attorney for Plaintiff,

2361 Guardian Building,
Detroit 26, Michigan.
Cadillac 2270

EDWARD B. HENSTEE and
WALTER N. MURRAY,
Attorneys-at-Law,

139 N. Clark St.,
Chicago 2, Ill.
Of Counsel

Dated: November 29, 1948.